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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF NEW JERSEY

REPLY BRIEF FOR APPELLANT (IN OPPOSITION TO MOTION TO DISMISS APPEAL, ETC.)

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TABLE OF CONTENTS

	PAGE
I	1
II	1
III	5
IV	14
V	15
CONCLUSION	15

Cases Cited

Biggers, Ex Parte, 85 Fla. 297, 95 So. 755 (1923)	11
Binkley v. United States, 282 Fed. 244 (C. C. A. 8, 1922)	10
Board of Supervisors of Hanover County v. Bazile, 195 Va. 739, 80 S. E. 2d 566 (1954)	11
Bowden v. Bowden, 198 Tenn. 143, 278 S. W. 2d 670 (1955)	9
Bradley, Ex Parte, 7 Wall. 364	7
Brown v. United States, —— U. S. ——, 3 L. Ed. 2d 609	13, 14fn
California Artificial Stone Pav. Co. v. Molitor, 113 U. S. 609	10
Cammer v. United States, 350 U. S. 399	8
Cannon v. State, 58 Okla. Cr. R. 451, 55 P. 2d 135 (1936)	9
Carlson v. Curtis, 234 U. S. 103	4

PAGE

Carr v. District Court, 147 Iowa 663, 126 N. W. 791 (1910) 10

Cheeseman, In re, 49 N. J. L. 115, 143 (S. Ct., 1886)..10, 12

Chiles, In re, 22 Wall. 157..... 10

Clark v. United States, 289 U. S. 1..... 12

Collins, Ex Parte, 329 Mich. 192, 45 N. W. 2d 31 (1950) 9

Collins v. Superior Court, 145 Cal. App. 2d 588, 302 P. 2d 805 (1956)..... 9

Cooke v. United States, 267 U. S. 517.....4, 9, 13, 14

Cooley, In re, 95 N. J. Eq. 485 (Ch., 1924), aff'd, 103 N. J. Eq. 377 (E. & A., 1928)..... 13

Cottingham, In re, 66 Colo. 335, 182 Pac. 2 (1919)... 10

Craig v. Harney, 331 U. S. 367..... 4

Cuddy, Ex Parte, 131 U. S. 280..... 10

Cunha, Ex Parte, 123 Cal. App. 625, 11 P. 2d 902 (1932), reh. den. 18 P. 2d 979..... 10

Dorrian v. Davis, 105 N. J. Eq. 147 (Ch., 1929)..... 15fn

Eilenbecker v. District Court, 134 U. S. 31..... 7

Eskay, In re, 122 F. 2d 819 N. 17 (C. C. A. 3, 1941)... 10

Eustace v. Lynch, 80 F. 2d 652 (C. C. A. 9, 1935)..... 10

Fay v. New York, 332 U. S. 261..... 4

Fisher v. Pace, 336 U. S. 155..... 4

Frank, In re, 135 N. J. L. 429 (S. Ct., 1947)..... 12

Freeman v. State, 188 Ark. 1058, 69 S. W. 2d 267 (1934) 11

PAGE

Globe Newspaper Co. v. Commonwealth, 18 Mass. 449, 74 N. E. 682 (1905) 11

Gompers v. United States, 233 U. S. 604 8

Gonzales, In re, 88 N. J. L. 536 (S. Ct., 1910) 10, 12

Green v. United States, 356 U. S. 165 ..... 8, 15

Grossman, Ex Parte, 267 U. S. 87 ..... 7fn

Hand, In re, 89 N. J. Eq. 469 (Ch., 1918) 10, 13

Henn, In re, 113 N. J. Eq. 155 (Ch., 1933) 13

Herald-Republican Pub. Co. v. Lewis, 42 Utah 188, 129 Pac. 624 (1913) 10

Hudgings, Ex Parte, 249 U. S. 378 4

Jibb, In re, 123 N. J. Eq. 251 (E. & A., 1938) 8

Krmpotich v. Krmpotich, 227 Minn. 567, 35 N. W. 2d 810 (1949) 9

La Grange v. State, —— Ind. ——, 153 N. E. 2d 593 (1958) 11

Long v. McMillan, 226 S. C. 596, 86 S. E. 2d 477 (1955) 9

McGill v. State, 209 Ga. 500, 74 S. E. 2d 78 (1953) ... 11

Merrimack River Sav. Bk. v. Clay Center, 219 U. S. 527 10

Michaelson v. United States, 266 U. S. 42 8

Nilva v. United States, 227 F. 2d 74 (C. A. 8, 1955), reh. den., 228 F. 2d 134, aff'd, 352 U. S. 385 ..... 8, 14

Offutt v. United States, 232 F. 2d 69 (C. A. D. C., 1956), cert. den. 351 U. S. 988 ..... 7, 14

Parker v. United States, 153 F. 2d 66 (C. C. A. 1, (1946) 14fn

PAGE

Passaic-Athenia Bus Co. v. Consolidated Bus Co., 100 N. J. Eq. 188 (Ch., 1926) 6fn, 15fn

Pease, Ex Parte, 123 Tex. Cr. R. 43, 57 S. W. 2d 575 (1933) 11

People v. Gerrard, 15 Ill. App. 2d 301, 146 N. E. 2d 229 (1957) 7

People v. Hille, 192 Ill. App. 139 (1915) 10

People v. Loughran, 2 Ill. 2d 258, 118 N. E. 2d 310 (1954) 7

Percival v. State, 45 Neb. 741, 64 N. W. 221 (1895) ... 10

Pettibone v. United States, 148 U. S. 197 10

Post v. Ohio, 7 Ohio Circuit Dec. 257, 14 Ohio Cir. Ct. R. 111 (1897) 11

Robert Boasberg, Petition of, 285 App. Div. 1113, 140 N. Y. S. 2d 192 (1955) 10

Robinson, In re, 117 N. C. 533, 23 S. E. 453 (1895) ... 11

Rosewater v. State, 47 Neb. 630, 66 N. W. 640 (1896) 11

Rotwein, In re, 291 N. Y. 116, 51 N. E. 2d 669 (1943) 10

Savin, Ex Parte, 131 U. S. 267 10

Schmidt, In re, 88 N. J. Eq. 21 (Ch., 1917) 10, 12

Schmidt v. United States, 115 F. 2d 394 (C. C. A. 6, 1940) 7, 10

Sinclair v. United States, 279 U. S. 749 10

Singer, Re, 105 N. J. Eq. 220, 147 Atl. 328 12

Singer, In re, 109 N. J. Eq. 103 (E. & A., 1931) 10, 12, 13

Staley v. South Jersey Realty Co., 83 N. J. Eq. 300 (E. & A., 1914) 6fn

PAGE

State v. Chaffman, 15 N. J. Super. 492 (App. Div., 1951) 4

State v. District Court, 58 Mont. 276, 191 Pac. 772 (1920) 10

State v. Eno, 145 W. Va. 473, 63 S. E. 2d 845 (1951) 13

State v. Martin, 125 Okl. 51, 256 Pac. 667 (1927)..... 10

State v. Thornton, 137 W. Va. 230, 72 S. E. 2d 203 (1952) 4

State v. Zarafu, 35 N. J. Super. 177 (App. Div., 1955) 9, 10, 15

Swanson v. Swanson, 10 N. J. Super. 513 (App. Div., 1950), affirmed 8 N. J. 169 (1951)..... 8

Thompson v. Pennsylvania R.R. Co., 48 N. J. Eq. 105 (Ch., 1891)..... 10

Tiene, In re, 17 N. J. 170 (1954).....10, 12, 15fn

United States v. Kroger Grocery & Baking Co., 163 F. 2d 168 (C. C. A. 7, 1947)..... 10

United States v. McGovern, 60 F. 2d 880 (C. C. A. 2, 1932) 10

United States v. P. & W. Coat Co., 52 F. Supp. 792 (E. D. N. Y., 1943)..... 9

United States v. United Mine Workers, 330 U. S. 258 .....9, 14fn

Verdon, In re, 91 N. J. L. 491 (S. Ct., 1918)..... 8

Watts, Re, 190 U. S. 1..... 10

Western Fruit Growers v. Gotfried, 136 F. 2d 98 (C. C. A. 9, 1943)..... 14fn

Widger v. United States, 244 F. 2d 103 (C. A. 5, 1957) 10

PAGE

Wisdom, Ex Parte, 233 Miss. 865, 79 So. 2d 523 (1955) 7

Woodbury v. Commonwealth, 295 Mass. 316, 3 N. E. 2d 779 (1936) 9

Zimmerman v. Zimmerman, 12 N. J. Super. 61 (App. Div., 1950) 8, 15

United States Constitution Cited

First Amendment 3

Fourth Amendment 3

Fourteenth Amendment 12

Statute Cited

28 U. S. C. Section 1257(2) 11-13

Rules Cited

R.R. 3:8 (N. J.) 5, 11-13

Rule 16.1 (U. S. S. Ct.) 1

IN THE

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Appellant.

REPLY BRIEF FOR APPELLANT (IN OPPOSITION TO MOTION TO DISMISS APPEAL, ETC.)

I.

The motion of the Attorney General of New Jersey is brought in the alternative to affirm the judgment below, purportedly pursuant to Rule 16.1 of the Rules of this Court. It is submitted that the latter Rule does not contemplate a motion to affirm a *state court* judgment sought to be reviewed on appeal, but contemplates only a motion to dismiss such appeal.

II.

The motion contains factual errors which, if not corrected, would severely prejudice the consideration of the question of jurisdiction and, ultimately, of the merits.

First, the motion erroneously states (p. 2) that when the appellant "requested permission to address the court * * * Judge HEGARTY denied the request * * *." However, in the next pages of the motion (pp. 3-4), Judge HEGARTY is quoted as saying, "* * * you asked permission to make the statement. You were granted that right * * *." See App. S. Ct. N. J. 6a, lines 36 to 38; *Id.*, 8a, lines 20 to 22.

Second, the Attorney General, in one place in his motion (p. 4) by factual implication, and in two other places therein (p. 11) by argumentative suggestion, repeats certain factual errors committed by the Supreme Court of New Jersey and the Appellate Division to the effect that (1) the appellant's refusal to answer questions before Judge HEGARTY caused an interruption of the matrimonial trial proceedings lasting until the following day, and (2) that the appellant was or may have been charged, tried and convicted for such refusal. We showed in our Jurisdictional Statement (p. 7, at fn. 2) that the interruption occasioned by the refusal lasted only for the duration of a *short recess* of the proceedings, and ended with the appellant's retraction of his refusal and with his resumption of testimony immediately following that short recess, all of which occurred on the same day (December 3, 1957), so that the refusal was but momentary. That short recess, moreover, was the direct result of a suggestion made by Judge HEGARTY himself that the appellant "maybe * * * should * * * consult with your counsel now" App. S. Ct. N. J. 9a, lines 5 to 6. Furthermore, the order to show cause of Judge LEYDEN citing the appellant for contempt referred only to "statements involving disrespect to and criticism of the judge then sitting in the cause", making no mention of the momentary and promptly retracted refusal to testify. App. S. Ct. N. J. 1a. Likewise the certification of Judge HEGARTY charged only "abusive and defamatory language" (*Id.* 2a), facts as to the refusal to testify being found in the

certification only in the quoted transcript matter embodied therein and annexed thereto. *Id.* 2a to 3a, 7a to 8a. In the contempt proceeding (before Judge NIMMO) (*Id.* 11a to 24a) the appellant called attention to the fact that he had retracted his refusal to testify (*Id.* 14a, lines 38 to 39), and there the matter was left, neither Judge NIMMO nor the prosecutor making any further reference to it. Notwithstanding all this, the Attorney General of New Jersey is depicting the case to this Court as involving a contumaciously significant refusal to testify. And in this respect, as mentioned, the Attorney General is repeating the factual errors of the Supreme Court of New Jersey and the Appellate Division. (The language embodying the erroneous assumption of those courts that the interruption occasioned by the refusal to testify persisted into the following day appears in Appendix A of our Jurisdictional Statement, p. 5a. The language showing the decisional reliance by those courts on the factor of refusal to testify appears in *Id.*, p. 6a. See also our Jurisdictional Statement, p. 7.)

The true factual setting of this contempt case, then, is simply one of speech—spoken words criticizing a judge. This speech did not result in any significant obstruction or disturbance of the orderly progress of the proceedings. The Attorney General's above-noted erroneous statements or intimations that the appellant spoke his words in contumacious defiance of a court order to remain silent, and that in addition the case is one of contumacious refusal to testify, are in the face of the unmistakable record facts referred to above. In short, the nature of the alleged contempt is such as to give rise to an issue of abridgment of First Amendment-Fourth Amendment rights of free speech, and this issue should not be obscured by unfounded suggestions that overt acts of obstruction or defiance to authority are involved in the case.

Furthermore, the groundless attempt to depict the case as involving such overt conduct of obstruction of judicial proceedings and defiance to court authority, conduct which is supposed to have occurred moreover in *facie curiae*, should not be permitted to obscure the other important constitutional issues in the case, namely, the due process issues arising from the summariness with which the appellant was "tried" for his allegedly contemptuous criticism of the judge. For appellant's case might well be deemed less constitutionally sympathetic as respects issues of procedural due process if he had in fact been guilty of outright acts of obstruction and defiance in *facie curiae* which might have necessitated and justified procedural shortcuts. Cf. *Ex Parte Hudgings*, 249 U. S. 378, 383; *Cooke* v. *United States*, 267 U. S. 517, 536; and authorities cited in our Jurisdictional Statement, p. 22, fn. 10.

On the other hand, if the Attorney General is correct in importing into the case the supposed charges of overt obstruction and defiance, there would be presented new issues of serious due process aggrievement, in that it is indisputable that the appellant did not receive adequate notice and hearing of any such charges. Cf. *Cooke* v. *United States*, 266 U. S. 517, 536-539; *State* v. *Chaffman*, 15 N. J. Super. 492, 497-498 (App. Div. 1951); *State* v. *Thornton*, 137 W. Va. 230, 238-239, 72 S. E. 2d 203, 207-208 (1952).

This Court may, of course, examine the record to determine for itself the relevant constitutional facts on the issues of whether the appellant addressed the court after denial of permission to do so, whether his refusal to testify was other than momentary and promptly retracted, and whether he was charged, tried and convicted (constitutionally or otherwise) with respect to any such alleged conduct. *Fay* v. *New York*, 332 U. S. 261, 272; *Craig* v. *Harney*, 331 U. S. 367, 373-374; *Carlson* v. *Curtiss*, 234 U. S. 103, 106. Cf. *Fisher* v. *Pace*, 336 U. S. 155, 160.

III.

The motion (p. 5) incorrectly states that in the contempt proceedings the appellant conceded the accuracy of the transcript of his allegedly contemptuous remarks to Judge HEGARTY; and that except for the latter transcript "no further evidence was offered either in support or against the charge of contempt." We showed in our Jurisdictional Statement (p. 11, item [14]) that the appellant did not concede the accuracy of the transcript; that the prosecutor did introduce additional evidence (to the effect that appellant had said his remarks were "not spontaneous"); and that the appellant objected to this additional evidence and vainly sought the right to introduce evidence in explanation or defense, viz, his proffered proofs that perjury, etc. had in fact occurred in the matrimonial proceeding (Jurisdictional Statement, pp. 11-12, items [14], [15], [16], [17]; see also *Id.*, p. 6, for the references to the record in the matrimonial proceeding as to the perjury, etc. believed by the appellant to have occurred).

Our insistence that the appellant did not concede the accuracy of the transcript is deemed by us crucial, not because we would challenge that accuracy if given an opportunity to do so, but beause this matter of the appellant's having conceded *vel non* the accuracy of the transcript, forms a decisive link in the chain of our procedural due process argument in this case. For, we contend that the "summary" contempt powers of New Jersey's R.R. 3:8 were so restrictively applied to the appellant as to deprive him of any opportunity to defend on the issues of justification and criminal intent; and that, when the appellant perceived that he was not going to be afforded an opportunity, by jury trial *or otherwise* (Jurisdictional Statement, pp. 11-12), to introduce proofs justifying his charges of perjury, etc., he drew back from submitting himself to be

"tried" on the basis of the contempt transcript standing alone. In other words, appellant's stand against conceding the accuracy of the transcript was *part of his stand against making any waiver*[1] of his constitutional right to an adequate trial of the issue of his criminal guilt.

The Attorney General's erroneous contentions that the appellant conceded the accuracy of the transcript and that no other evidence was offered by either side in the contempt proceeding are made for the purpose of portraying the case as one in which, supposedly, no issue need arise of denial of jury trial because there was nothing for a jury to try. This argument is explicitly advanced at pp. 5-6 of the motion. The argument runs: the accuracy of the transcript was admitted, the transcript shows criminal contempt on its face, hence the making of the adjudication of contempt was merely a matter of law for the court. This entire line of argument stands or falls on the question of the correctness of a very important assumption of law that the Attorney General is making, namely, that in the circumstances of this case of criminal contempt the alleged contemnor had no federal constitutional right to be heard (by a jury or otherwise) on the issues of motive, intent, justification or good faith. This assumption of law is manifestly wrong.

To begin with, it is to be remembered that the appellant was not punished *instanter* as for direct contempt in *facie curiae*, but was tried under an at least ostensible notice-and-hearing procedure, and by a judge who had not personally observed the alleged contempt and had no direct personal knowledge thereof or of the matrimonial proceeding in which it arose. This being so, the appellant be-

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[1] Cf. *Staley* v. *South Jersey Realty Co.*, 83 N. J. Eq. 300, 307, 308 (E. & A. 1914); *Passaic-Athenia Bus Co.* v. *Consolidated Bus Co.*, 100 N. J. Eq. 188, 190-192 (Ch. 1926).

came entitled to the constitutional protections accorded to persons tried as for indirect or constructive criminal contempt. The case in this respect is virtually if not perfectly on all fours with *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C. 1956), cert. den. 351 U. S. 988. Cf. the procedure employed in the contempt trial involved in *Ex Parte Bradley*, 7 Wall. 364, 373. Cf. also *Schmidt* v. *United States*, 115 F. 2d 394, 398 (C. C. A. 6, 1940) (alleged violation of grand jury secrecy by interviewing grand jurors and filing affidavits based thereon; conviction reversed because case tried by a judge against whom affidavits of bias and prejudice were pending; remanded for new trial by a different judge with instructions to decide issues of "contemptuous motive and wilful and intentional disrespect of the court. Such decision is required as a prerequisite to a proper determination of the penalty to be imposed. *Cooke* v. *United States*, *supra*, 267 U. S. page 537 * * *."). That the intrusion into a contempt trial of matters not within the judge's personal knowledge requires treating the case as one of indirect or constructive contempt even where the judge is the same one who observed the allegedly contemptuous happenings was squarely held in *People* v. *Gerrard*, 15 Ill. App. 2d 301, 146 N. E. 2d 229 (1957). Cf. *People* v. *Loughran*, 2 Ill. 2d 258, 118 N. E. 2d 310 (1954); *Ex Parte Wisdom*, 233 Miss. 865, 79 So. 2d 523 (1955). See also the authorities cited in our Jurisdictional Statement, p. 22, fn. 11.

With the apparently sole exception of jury trial[2]—which we are seeking in this case by inviting the Court to reconsider *Eilenbecker* v. *District Court*, 134 U. S. 31 (Juris-

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[2] *Ex Parte Grossman*, 267 U. S. 87, 117-118, 122, speaks undefinedly of the non-applicability of some provisions of the bill of rights in criminal contempt trials, but the reference appears to look to nothing more than the jury trial point, and possibly to cases of literally summary punishment of direct contempts.

dictional Statement, pp. 20-25) —a trial of constructive criminal contempt is for all practical purposes tantamount to the trial of crime. *Gompers* v. *United States*, 233 U. S. 604, 610-611; *Michaelson* v. *United States*, 266 U. S. 42, 66, 67; *Cammer* v. *United States*, 350 U. S. 399, 403; *Green* v. *United States*, 356 U. S. 165, 179; *In re Jibb*, 123 N. J. Eq. 251 (E. & A. 1938); *Swanson* v. *Swanson*, 10 N. J. Super. 513, 520 (App. Div. 1950), affirmed 8 N. J. 169 (1951); *In re Verdon*, 91 N. J. L. 491, 495-496 (S. Ct. 1918). Defendants in such contempt trials are presumed innocent, and their guilt must be proved beyond a reasonable doubt. See authorities collected in *Nilva* v. *United States*, 352 U. S. 385, 399 n. 3 (dissenting op.); see also the New Jersey cases last cited, and *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 69-70 (App. Div. 1950).

Of more specific concern in the present case, however, is the question of the ambit of defenses allowed or required to be allowed in criminal contempt trials. The Attorney General's motion has focussed the case upon this topic, through the contention that there was no issue to be tried by a jury once the transcript of the allegedly contemptuous remarks had been put in evidence and proved or admitted. As we have found no systematic treatment of this important and interesting topic (as to the range of defenses in criminal contempt), and as our case, we realize, may well turn on our ability to show to this Court that the particular defenses which the appellant unavailingly endeavored to assert in the contempt proceeding were assertible as a matter of federal constitutional right (and were of a type appropriate for consideration by a jury), we shall treat the topic mentioned in some detail, albeit necessarily not exhaustively, hopeful that we may have the opportunity to treat it more fully in a presentation on the merits:

1. The general ambit of defenses in a trial for criminal contempt is apparently not discernibly different from that in prosecutions for crime. E.g., *Cooke* v. *United States*, 267 U. S. 517, 536-539; *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955); *Long* v. *McMillan*, 226 S. C. 596, 608, 86 S. E. 2d 477, 482 (1955) ("the same inalienable right to be heard in his defense as he would against a charge of murder or any other crime"); *Bowdon* v. *Bowdon*, 198 Tenn. 143, 147, 278 S. W. 2d 670, 672 (1955) ("should admit of no technical rulings against the accused but the freest opportunity should always be given him to produce his defense"); *Woodbury* v. *Commonwealth*, 295 Mass. 316, 323, 3 N. E. 2d 779, 784 (1936) (" 'In general the proceedings leading up to the punishment should be in accordance with the principles which govern the practice in criminal cases.' ").

2. The right of a defendant in a trial for criminal contempt to assert his defenses is founded in constitutional due process. *Cooke* v. *United States*, *supra*. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 363-376 (dissenting Op.). See also, e.g., *United States* v. *P. & W. Coat Co.*, 52 F. Supp. 792, 794 (E. D. N. Y. 1943); *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955); *Ex Parte Collins*, 329 Mich. 192, 196-197, 45 N. W. 2d 31, 33 (1950); *Krmpotich* v. *Krmpotich*, 227 Minn. 567, 569, 35 N. W. 2d 810, 811 (1949); *Cannon* v. *State*, 58 Okla. Cr. R. 451, 55 P. 2d 135 (1936); *Collins* v. *Superior Court*, 145 Cal. App. 2d 588, 594, 302 P. 2d 805, 809 (1956); *Ex Parte Wisdom*, 223 Miss. 865, 79 So. 2d 523 (1955).

3. Specifically, the defense of lack of criminal intent, together with related defenses as to motive, good faith, justification, truth, and the like, and, in general, full right to make "defense or explanation", are accorded to defendants in criminal contempt trials. The leading case is *Cooke* v. *United States*, 267 U. S. 517, 536-539. Also see, e.g.,

In re Chiles, 22 Wall. 157, 169; *California Artificial Stone Pav. Co.* v. *Molitor*, 113 U. S. 609, 618; *Ex Parte Savin*, 131 U. S. 267, 278-279; *Ex Parte Cuddy*, 131 U. S. 280, 286; *Pettibone* v. *United States*, 148 U. S. 197, 206-207; *Re Watts*, 190 U. S. 1, 29-33; *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527, 536-537; *Sinclair* v. *United States*, 279 U. S. 749, 765-768; *Widger* v. *United States*, 244 F. 2d 103, 106 (C. A. 5, 1957); *United States* v. *Kroger Grocery & Baking Co.*, 163 F. 2d 168, 172-175 (C. C. A. 7, 1947); *Schmidt* v. *United States*, 115 F. 2d 394, 398 (C. C. A. 6, 1940); *In re Eskay*, 122 F. 2d 819, 822 N. 17 (C. C. A. 3, 1941); *Eustace* v. *Lynch*, 80 F. 2d 652, 656 (C. C. A. 9, 1935); *United States* v. *McGovern*, 60 F. 2d 880, 888 (C. C. A. 2, 1932); *Binkley* v. *United States*, 282 Fed. 244, 246 (C. C. A. 8, 1922); *In re Tiene*, 17 N. J. 170, 180-181 (1954); *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955); *In re Singer*, 109 N. J. Eq. 103, 105 (E. & A. 1931); *In re Hand*, 89 N. J. Eq. 469, 471 (Ch. 1918); *In re Schmidt*, 88 N. J. Eq. 21, 24 (Ch. 1917); *In re Gonzales*, 88 N. J. L. 536, 544 (S. Ct. 1910); *In re Cheeseman*, 49 N. J. L. 115, 143 (S. Ct. 1886); *Thompson* v. *Pennsylvania R.R. Co.*, 48 N. J. Eq. 105, 108-109 (Ch. 1891); *In re Rotwein*, 291 N. Y. 116, 51 N. E. 2d 669 (1943); *Petition of Robert Boasberg*, 285 App. Div. 1113, 140 N. Y. S. 2d 192 (1955) same case, 286 App. Div. 951, 143 N. Y. S. 2d 272 (1955); *People* v. *Hille*, 192 Ill. App. 139 (1915); *In re Cottingham*, 66 Colo. 335, 337, 182 Pac. 2, 3 (1919); *Ex Parte Cunha*, 123 Cal. App. 625, 11 P. 2d 902, 906 (1932), reh. den. 18 P. 2d 979; *State* v. *District Court*, 58 Mont. 276, 191 Pac. 772, 776 (1920); *State* v. *Martin*, 125 Okl. 51, 256 Pac. 667 (1927); *Percival* v. *State*, 45 Neb. 741, 64 N. W. 221 (1895); *Carr* v. *District Court*, 147 Iowa 663, 126 N. W. 791 (1910); *Herald-Republican Pub. Co.* v. *Lewis*, 42 Utah 188, 129 Pac. 624 (1913).

4. Cf. the cases holding that newspapers may defend against charges of criminal contempt by showing the truth

of the writing. *McGill* v. *State*, 209 Ga. 500, 74 S. E. 2d 78 (1953); *Ex Parte Pease*, 123 Tex. Cr. R. 43, 57 S. W. 2d 575 (1933); *Post* v. *Ohio*, 7 Ohio Circuit Dec. 257, 14 Ohio Cir. Ct. R. 111 (1897). Cf. *Globe Newspaper Co.* v. *Commonwealth*, 18 Mass. 449, 74 N. E. 632 (1905) defense of truth considered in mitigation.

5. The total closing off of the appellant's opportunity to introduce his proofs as to intent, motivation, good faith and "truth", or to make "defense or explanation", was a denial of Fourteenth Amendment due process. As this denial occurred in the framework of the rigorous "summariness" generated by R.R. 3:8, an appropriate issue is presented for review within the jurisdictional provisions of 28 U. S. C. Section 1257(2).

6. A familiar "intent" defense in criminal contempt for speech or writings is that the words are susceptible of a non-contemptuous interpretation and that such was intended. *Freeman* v. *State*, 188 Ark. 1058, 69 S. W. 2d 267 (1934); *Ex Parte Biggers*, 85 Fla. 297, 95 So. 755 (1923); *La Grange* v. *State*, —— Ind. ——, 153 N. E. 2d 593 (1958); *Rosewater* v. *State*, 47 Neb. 630, 66 N. W. 640 (1896); *In re Robinson*, 117 N. C. 533, 23 S. E. 453 (1895); *Board of Supervisors of Hanover County* v. *Bazile*, 195 Va. 739, 80 S. E. 2d 566 (1954). The record herein shows the appellant repeatedly attempting to explain that he intended no contempt towards the court but felt impelled to call attention to "truth" concerning conduct of his wife and other persons in the matrimonial litigation. App. S. Ct. N. J. 8a, lines 21 to 24; *Id.*, 13a, line 10; *Id.*, 19a, lines 17 to 21; *Id.*, 20a, lines 7 to 9; *Id.*, 21a, line 39 to 22a, line 13; *Id.*, 22a, lines 16 to 28; *Id.*, 31a, line 19, to 32a, line 24. It is submitted that the appellant's allegedly contemptuous language (*Id.*, 2a to 3a) was susceptible of being interpreted in accordance with the "truth" explanation just noted, and was not intended as contempt of the

court. By denying the appellant a trial (by jury or otherwise) of this issue of intent the state courts have deprived him of substantial procedural rights in contravention of the due process clause of the Fourteenth Amendment. This deprivation was effected through the applying of the summary procedures of R.R. 3:8; thereby an appealable issue is presented within the meaning of 28 U. S. C. 1257(2).

7. The defense of lack of criminal intent assumes additional importance in the instant case because New Jersey is one of the state jurisdictions which still recognize an at least qualified right of expurgation by disavowal of contumacious intent. In *Clark* v. *United States*, 289 U. S. 1, 17, this Court abrogated the expurgation doctrine in federal contempt proceedings and said, "It has been rejected generally in the states", citing for New Jersey the case of *Re Singer*, 105 N. J. Eq. 220, 147 Atl. 328. This Court was apparently unaware in the *Clark* case that the *Singer* decision in 105 *N. J. Eq.* had been reversed by New Jersey's Court of Errors and Appeals in *In re Singer*, 109 N. J. Eq. 103 (E. & A. 1931). The *Singer* decision in 109 *N. J. Eq.* (at p. 105) expressly preserves the doctrine that "Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt." The *Singer* decision in 109 *N. J. Eq.* has never been disapproved or even criticized. It is apparently still the law in New Jersey. Earlier New Jersey decisions permit of no doubt that some form of the expurgation doctrine, combined occasionally with a right of defense of justification, long ago became rooted in that State. *In re Cheeseman*, 49 N. J. L. 115, 143 (S. Ct. 1886) ("a fair opportunity of denying or confessing [the] truth [of the charges]") (cited with approval in *In re Frank*, 135 N. J. L. 429, 432 (S. Ct. 1947), which in turn is cited with approval in *In re Tiene*, 17 N. J. 170, 180 (1954)); *In re Gonzales*, 88 N. J. L. 536 (S. Ct. 1910); *In re Schmidt*, 88 N. J. Eq. 21, 24 (Ch. 1917). The

appellant in this case was shut off from all opportunity to develop the defensive facts, concerning his intent, that might have obtained for him a purgation or at least a mitigation of sentence under the doctrine above mentioned. This foreclosing of opportunity for defense was not harmless because the defense in question, as seen, has vitality and reality in New Jersey. The foreclosing of opportunity was the product, we submit, of the way in which the summary procedures called into being by R.R. 3:8 were applied to the appellant. And thereby arises another important aspect of our claim of federal constitutional aggrievement, cognizable by this Court, we submit, under 28 U. S. C. Sec. 1257(2).

8. Apart from the questions as to the doctrine of expurgation as such, the defense of lack of criminal intent is constitutionally indefeasible because of its bearing on mitigation of punishment. *Cooke* v. *United States*, 267 U. S. 517, 538, which, as seen, formulates in due process terms the right to defend on the issue of intent, expressly holds also that even where the allegedly contumacious statement is admitted by the defendant as having been made by him, "the intention * * * must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, [and] the court cannot properly exclude evidence in mitigation. It is a proper part of the defense." To the same effect see *State* v. *Eno*, 145 W. Va. 473, 63 S. E. 2d 845 (1951). See also *Brown* v. *United States*, —— U. S. ——, 3 L. Ed. 2d 609, 620-621 (dissenting op.). New Jersey cases in accord are: *In re Singer*, 109 N. J. Eq. 103, 105 (E. & A. 1931); In re *Cooley*, 95 N. J. Eq. 485, 487-488 (Ch. 1924), aff'd, 103 N. J. Eq. 377 (E. & A. 1928); *In re Henn*, 113 N. J. Eq 155, 158 (Ch. 1933), order to show cause discharged, 114 N. J. Eq. 452 (Ch. 1933); *In re Hand*, 89 N. J. Eq. 469, 470 (Ch. 1918) (taking into consideration the respondent's "great mental strain" occasioned by a financial setback in the litigation).

9. The specific procedural right which the appellant wanted and was denied in connection with his attempted defense of lack of criminal intent was the right to have the court consider the transcript in the matrimonial proceeding, where the appellant believed justification would be found for his allegedly contemptuous remarks. App. S. Ct. N. J. 19a, lines 16 to 21. *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C. 1956), cert. den., 351 U. S. 988, is closely similar to the instant case as respects such claim of right by a defendant in criminal contempt proceedings. The *Offutt* case upholds the right and expressly rests it upon the procedural due process principle announced in *Cooke* v. *United States*, 267 U. S. 517, 537. Cf. *Nilva* v. *United States*, 227 F. 2d 74, 78-79 (C. A. 8, 1955), reh. den., 228 F. 2d 134, aff'd, 352 U. S. 385.

IV.

The Attorney General's statement that "none" of appellant's "contentions was timely advanced in the New Jersey courts * * *" (Mot. p. 6) is incomprehensible. Our Jurisdictional Statement (pp. 13-18) gives the appropriate record references. *One* of our contentions is perhaps not adequately preserved for appeal to this Court, namely, the contention as to the inadequacy of the notice that the charge was criminal contempt.[3] We have heretofore sug-

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[3] Jurisdictional Statement, question No. 4, pp. 4-5; *Id.*, p. 25. See also the exhaustive study of the point in *United States* v. *United Mine Workers*, 330 U. S. 258, 368-376 (dissenting Op.); *Brown* v. *United States*, —— U. S. ——, 3 L. ed. 2d 609, 623 (dissenting Op.); *Parker* v. *United States*, 153 F. 2d 66, 70 (C. C. A. 1, 1946). See especially, for its striking factual resemblance to the situation at bar, *Western Fruit Growers* v. *Gotfried*, 136 F. 2d 98, 101 (C. C. A. 9, 1943) ("* * * Not until the trial in the District Court was actually in progress were the appellants definitely notified that

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gested that this point was sufficiently preserved in view of its being interwoven throughout with the jury trial point and with the objections to the post-haste "summariness" of the contempt proceeding. Jurisdictional Statement, pp. 14, 15, 17, 18, 25.

V.

The Attorney General's suggestion (Mot. p. 9) that appellant could have introduced new evidence in the state appellate courts ignores *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 69 App. Div. 1950), cited in our Jurisdictional Statement, p. 23. Even more conclusive against the Attorney General's suggestion is *State* v. *Zarafu*, 35 N. J. Super. 177, 183-184 (App. Div. 1955). In any event, "* * * even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge." *Green* v. *United States*, 356 U. S. 165, 200 (dissenting op.).

CONCLUSION

It is respectfully submitted that the motion of the Attorney General of New Jersey should be denied.

Respectfully submitted,

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the contempt was criminal in character. Therefore, the contemnors were not aware at the out-set of the criminal nature of the proceeding.") Cf. also *In re Tiene*, 17 N. J. 170, 182 (1954); *Passaic-Atlenia Bus Co.* v. *Consolidated Bus Co.*, 100 N. J. Eq. 188, 192 (Ch. 1926); *Dorrian* v *Davis*, 105 N. J. Eq. 147 (Ch. 1929).